THLOPTHLOCCO TRIBAL TOWN
v.
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-16-A Decided October 25, 1985

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) refusing to take certain land in Indian trust status for the Thlopthlocco Tribal Town, Oklahoma.

Vacated and remanded.

1. Indians: Lands: Acquired Lands--Indians: Reservations: Boundaries

For the purposes of tribal acquisition of land in trust status, 25 CFR 151.2(f) provides that in Oklahoma "Indian reservation" means that area of land constituting the former reservation of the tribe.

APPEARANCES: John G. Ghostbear, Esq., Tulsa, Oklahoma for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On January 18, 1985, the Board of Indian Appeals (Board) received a notice of appeal from the Thlopthlocco Tribal Town (appellant). The notice had initially been filed with the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) on November 8, 1984, and was forwarded to the Board in accordance with the provisions of 25 CFR 2.19(c)(2). Appellant sought review of appellee's September 25, 1984, decision refusing to take certain land into Indian trust status on behalf of appellant. For the reasons discussed below, the Board vacates that decision and remands the case to the Deputy Assistant Secretary for further consideration in accordance with this opinion.

Background

Appellant is one of approximately 42 Creek tribal towns Federally chartered under the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. § 503 (1982). On July 16, 1984, appellant's Tribal King submitted to the Muskogee Area Director, Bureau of Indian Affairs (BIA), (Area Director) a package proposing the acquisition in trust of certain land

in Tulsa County, Oklahoma. Appellant's proposal showed that it intended to use the acquired parcel for an industrial park, warehouse facilities, flea market, hotel/restaurant, recreational park, arts and crafts facilities, and a bingo operation. Appellant's package included a contract for the sale and purchase of the real property, a general warranty deed, a resolution authorizing the bingo operation, and an agreement with the Seminole Tribe of Florida for the management of the bingo operation. Appellant noted that its present land base was not suitable for economic development because it was located within the flood plain of the North Canadian River.

On July 27, 1984, the Area Director forwarded appellant's proposal to appellee. The transmittal memorandum states:

> The property that is proposed to be taken in trust is not located within the land base or adjacent to Town lands; however, the property is within the exterior boundaries of the Creek Nation. The Town's total land holdings to date are 2,336.77 acres, scattered in several sections, none of which are in the vicinity of the land proposed for acquisition.
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> In reviewing this aspect, the question arises: Would this acquisition be considered as taking land in trust outside exterior Tribal Town boundaries? This land is to be used, in part, for bingo activities.

On September 25, 1984, appellee responded to the Area Director, stating:

> For the reasons as hereinafter outlined, we have decided to decline the town's request that the United States accept the subject land in trust status.
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> The creation of off-reservation or similar islands of isolated trust pockets for the sole purpose of accommodating activities which extend beyond local public policy, affects Indian land acquisition activities nationwide. While bingo and other similar activities may generate substantial income for a tribe if it chooses to use existing reservation land for these purposes, we believe that in view of current controversies involving such activities the discretionary authority vested in the Assistant Secretary to create off-reservation trust parcels should be exercised with extreme caution.
>
> We will continue to review and look more favorably to those applications that embrace plans for housing or more traditional types of economic enterprises.

By letter dated October 10, 1984, the Area Director forwarded appellee's memorandum to appellant and denied the request that the land be taken in trust. Neither the Area Director nor appellee addressed the other purposes for which appellant intended to use the property.

Appellant appealed this decision to appellee by letter dated November 8, 1984. On January 18, 1985, appellee forwarded the appeal and administrative record to the Board under 25 CFR 2.19(c)(2). Because certain documentation required by 43 CFR 4.335(b) was missing, the Board returned the record to appellee. The Board received the record back on April 1, 1985. A briefing schedule was established in the Board's April 3, 1985, notice of docketing. No briefs were filed.

Discussion and Conclusions

Land acquisitions in trust are governed by Departmental regulations appearing in 25 CFR Part 151. According to section 151.3(a):

> Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

This section, thus, sets up three separate circumstances under which BIA may take land in trust for a tribe. Subject to any further regulatory requirements, such as those found in 25 CFR 151.10, discussed infra, under subsection (1) land may be taken in trust without regard to its intended use if it is located within the tribe's reservation boundaries. Subsection (2) allows land located outside the reservation to be taken into trust, again without regard to its intended use, if the tribe already owns an interest in that particular land. Finally, subsection (3) requires that land that is not within the tribe's reservation boundaries and in which the tribe does not own an interest, may be acquired in trust only if it promotes one of the three purposes specified in the subsection.

Section 151.10 lists seven factors to be considered in evaluating all requests for acquisitions of land in trust status:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
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> (b) The need of the individual Indian or the tribe for additional land;
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> (c) The purposes for which the land will be used;
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> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; [1/]

(f) Jurisdictional problems and potential conflicts of land use which may arise; [2/] and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

In the present case, appellee failed to specify under which subsection of 25 CFR 151.3 he had considered this proposal. Clearly subsection (2) does not apply because the tribe did not previously own an interest in this land. Thus appellee should have considered whether the acquisition could be approved under either subsection (1) or (3). The decision implicitly considers the acquisition only under subsection (3) since appellee states that the acquisition would create an off-reservation pocket of trust land, used solely for a purpose that was contrary to local public policy. Only subsection (3) requires a finding of both location and intended use. Appellee reinforced this apparent determination that the acquisition was off-reservation by suggesting that the use of existing reservation land for bingo would be permissible, and that BIA would look more favorably upon land acquisition requests "for housing or more traditional types of economic enterprises." The Board, therefore, finds that appellee considered appellant's proposed acquisition under 25 CFR 151.3(a)(3).

Appellee also did not specify which of the factors listed in section 151.10 affected his decision. Instead, he merely stated his belief that because of the controversial nature of Indian bingo, which he incorrectly characterized as the sole intended use of the property, the acquisition of off-reservation land for this purpose should not be approved. It must be assumed that this determination was made after consideration of the factors listed in section 151.10(c) and (f). It must furthermore be assumed that appellee had no problems with any of the other section 151.10 factors because of his failure to mention any such problems. The Board thus finds that appellee concluded, after reviewing all of the factors listed in 25 CFR 151.10, that there were problems under subsections (c) and (f).

The first question before the Board is, therefore, whether appellee correctly considered this proposed acquisition solely under 25 CFR 151.3(a)(3). Subsection (3) implicitly requires an initial determination that the land proposed for acquisition is not within the exterior boundaries of the reservation. As seen in the quotation of this section, supra, it furthermore

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1/ Appellant specifically addressed this factor in its proposal, stating that the effect of the removal of this property from the tax rolls would be nominal because the tax generated by it was only $382.92 per year.

2/ This factor was also addressed. Appellant stated that although exclusive jurisdiction would be with the Federal Government and itself, it would work with State and local officials to develop a satisfactory management plan.

requires a showing that the proposed off-reservation acquisition is needed "to facilitate tribal self-determination, economic development, or Indian housing." By contrast, subsection (1) requires only a finding that the land is within the exterior boundaries of the tribe's reservation.

[1] Because of the unique historical situation of Oklahoma and the Oklahoma tribes, the definition of reservation set forth in 25 CFR 151.2(f) provides a specific exception for Oklahoma:

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, "Indian reservation" means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary. [Emphasis added.]

Neither the Area Director nor appellee determined that the proposed acquisition is external to "that area of land constituting the former reservation of the tribe." In fact, the Area Director specifically noted that the parcel was within the boundaries of the former Creek Nation. Appellee's conclusion that the acquisition would constitute an off-reservation pocket of trust land is, therefore, legally incorrect. Consequently, the decision to evaluate the proposed acquisition solely under 25 CFR 151.3(a)(3) is also incorrect. Appellant's request should have been evaluated under 25 CFR 151.3(a)(1) .

Furthermore, appellee failed to recognize that appellant intended to use the parcel for several purposes, only one of which could in any way be characterized as an activity extending "beyond local public policy." By improperly restricting his view of appellant's intended uses of the property, appellee failed to consider the proposed acquisition fully.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 25, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is vacated and the matter is remanded to him for further consideration consistent with this opinion.

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Jerry Muskrat
Administrative Judge

I concur in the result:

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Bernard V. Parrette
Chief Administrative Judge